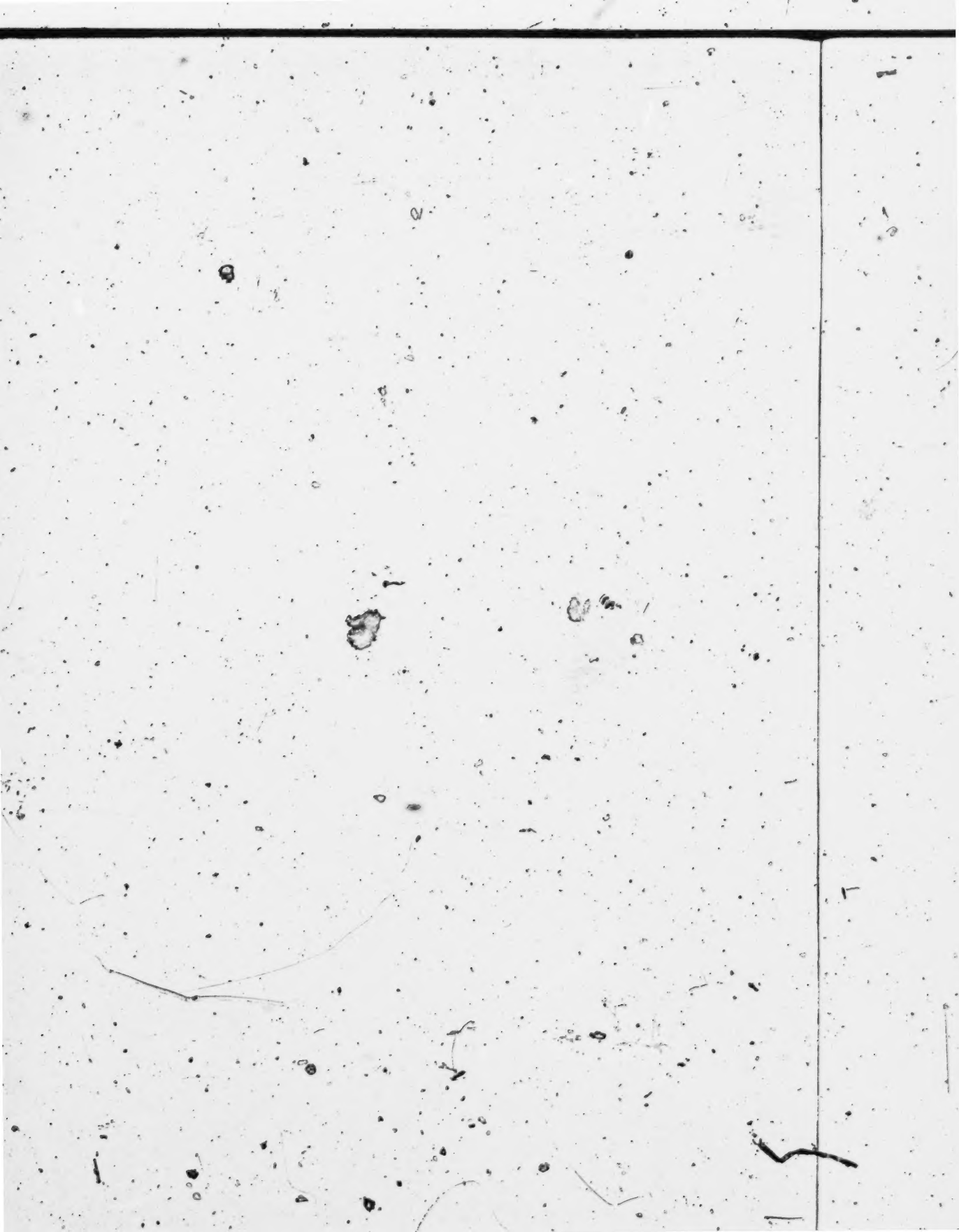

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 846

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR. AND FRED P. MORRISSEY, AS MEMBERS THEREOF,

Appellants,

vs.

BALTIMORE SHIPPERS AND RECEIVERS ASSOCIATION, INC., THE CHARTER OAK SHIPPERS COOPERATIVE ASSOCIATION, INC., INDUSTRIAL SHIPPERS ASSOCIATION, INC., UNITED SHIPPERS ASSOCIATION, INC., CHARLES J. WORTH DRAYAGE COMPANY, LOS ANGELES WHOLESALE INSTITUTE, G. I. TRUCKING COMPANY, REDWAY TRUCK AND WAREHOUSE COMPANY,

Appellees.

On Appeal From the United States District Court
For the Northern District of California

MOTION TO AFFIRM

Appellees, CHARLES J. WORTH DRAYAGE COMPANY, LOS ANGELES WHOLESALE INSTITUTE, G. I. TRUCKING COMPANY, REDWAY TRUCK AND WAREHOUSE COMPANY, respectfully move the Court to affirm the judgment sought to be reviewed on appeal on the ground that it is manifest that the court below was correct in granting the permanent injunction to prohibit the appellants from asserting economic regulation in a manner which resulted in a burden upon interstate commerce, and within a field preempted by federal regulation.

STATUTES INVOLVED

In addition to those statutes referenced by appellants, the following are also relevant: 54 Stat. 899.

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Found as preamble to Part I of Interstate Commerce Act.)

49 U.S.C., § 302 (a):

> "(a) The provisions of this chapter [Motor Carrier Act] apply to the transportation of passengers or property by motor vehicles engaged in interstate or foreign commerce and to the procurement of and the provisions of facilities for such transportation,

and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is vested in the Interstate Commerce Commission."

SUMMARY OF ARGUMENT

1. *The Pre-emption Question.* The judgment of the court below was correct and is supported by the findings of fact and conclusions of law that the Interstate Commerce Act, including both the Motor Carrier Act (Part II) and the Freight Forwarder Act (Part IV), and the nature of the subject matter sought to be regulated by the appellants require a finding that the field involved has been pre-empted by federal legislation and is subject to regulation, if at all, by the Interstate Commerce Commission. The appellants attempted economic regulation of motor carriers performing services essential to interstate operations of bona fide nonprofit shippers associations is clearly regulation of a subject matter intended by Congress to be free from regulation "unless and to the extent" that the Interstate Commerce Commission determines that the national transportation policy requires such regulation. 49 U.S.C., § 303(b)(8). The fact that the Interstate Commerce Commission does not actively exercise its authority in all phases of the field does not permit appellants to step into the area of federal activity. *Railroad Transfer Service, Inc. v. City of Chicago,* 386 U.S. 351 (1967); *Chicago v. Atchison, Topeka & Santa Fe Railway Co.,* 357 U.S. 77 (1958); *Independent Truckers, Inc.* 212 F.Supp. 402 (Neb. 1963). Further, since nonprofit shippers associations, sanctioned by 49 U.S.C., § 1002(c)(1), operate in all essential respects as

freight forwarders,[1] motor carriers servicing nonprofit shippers associations may voluntarily establish assembling and distribution rates or charges as expressly provided by 49 U.S.C., § 1008, as have each of the appellee motor carriers. The express and direct conflict between appellants' attempted economic regulation and appellee motor carriers' valid assembling and distribution tariffs on file with the Interstate Commerce Commission, requires by all principles of pre-emption that the state regulation be struck down. U. S. Const., Art. VI, Par. 2, *Pennsylvania v. Nelson*, 350 U. S. 497 (1956). *Cf., United States v. Capital Transit Co.*, 325 U. S. 357 (1945).

2. *The commerce clause question.* The judgment of the court below was correct and is supported by its findings of fact and conclusions of law that the scheme of economic regulation appellants seek to impose upon the portion of interstate commerce transported by the appellee motor carriers is a direct and substantial burden upon interstate commerce and therefore is violative of the Commerce Clause of the United States Constitution. U. S. Const., Art. 1, Section 8; *The Shreveport Rate Case, Houston & Texas Railway Co. v. United States*, 234 U. S. 342 (1914); *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101 (1912); *Covington & Cincinnati Bridge Co. v. Commonwealth of Kentucky*, 154 U. S. 204 (1894); *Wabash, St. Louis & Pacific R. Co. v.*

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[1] As was stipulated by the parties and found by the Court, the functions performed by freight forwarders and nonprofit shippers associations are nearly identical with the exception of the profit motive and service to the general public in the case of freight forwarders, as compared with the nonprofit shippers association. Each handles the consolidation, shipment, break-bulk, and distribution of goods, attempting to take advantage of the bulk rates and the maximum efficiencies in assembly, distribution and routing techniques.

Illinois, 118 U. S. 557 (1886); *State Corporation Commission v. Bartlett & Co., Grain*, 338 F.2d 495 (10th Cir. 1964), *cert. den.* 380 U. S. 964 (1965)

Aside from the basic principles supporting the lower court's judgment, the findings of fact are supported by uncontradicted evidence to the effect that if the appellants' scheme of economic regulation were to be allowed to continue, the increased transportation costs would result in a drying up of interstate traffic because of the inability of out-of-state producers to compete in the California market. Such an unreasonable disruption of the free flow of commerce is clearly prohibited. *Buck v. Kuykendall.* 267 U.S. 307 (1925). Further, the appellants' scheme of economic regulation results in an admitted unconstitutional violation of the "long and short haul" principle in that motor carriers serving nonprofit shippers associations would be forced to exact higher rates and charges for the short haul deliveries and pickups within a commercial zone than they would charge for the long haul deliveries and pickups outside of such zone. *The Shreveport Rate Case, Houston & Texas Railway Co. v. United States*, 234 U.S. 342 (1914).

3. There are no substantial questions presented by this appeal which require further argument before this Court; therefore, this Petition to Affirm should be granted. The court below applied time-honored principles of constitutional law in granting plaintiffs and appellees relief from an illegal, unreasonable, discriminatory and burdensome scheme of economic regulation of interstate commerce. None of the alleged "substantial questions" urged by the appellants in their jurisdictional statement

are meritorious.[2] The court below answered the essential constitutional questions before it regarding the Supremacy and Commerce clauses of the United States Constitution, and since these questions were dispositive of the matter, it was unnecessary for the court to consider any others.

ARGUMENT

I

THE PRE-EMPTION QUESTION

The court below was well founded in its decision that the supremacy clause of the United States Constitution forbids the type of economic regulation the appellants seek to impose upon the appellee motor carriers, which service interstate traffic for appellee nonprofit shippers associations. Whether the pre-emption occurs because the field involved is one left totally to federal regulation or because the attempted regulation is in conflict with federal regulation, the finding of pre-emption by the court below is well supported.

The lower court held that Congress has pre-empted the field authorized to be regulated by appellants. In doing so, it noted, and relied upon, in some degree, *State Corporation Commission v. Bartlett & Co., Grain*, 338 F.2d 495 (10th Cir. 1964). *Cert den.* 380 U. S. 964 (1965). Appellants would have this Court believe that *Bartlett*

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[2] While a few of the questions may require some discussion, most of them simply were not even before the court below or were disposed of by stipulation of the parties in the Joint Pretrial Order, and therefore, cannot be a subject of concern for this Court; *i.e.*, the status of nonprofit shippers associations *vis-a-vis*, a single shipper; or the propriety of appellants' regulation of purely local transportation which does not adversely burden interstate commerce.

only considered subsection (6) of 49 U.S.C., § 303(b). On the contrary, however, the Court in *Bartlett* specifically referred to the entire section 303 (b) and all of its exceptions in finding pre-emption, saying:

> "In the case at bar, the state interest is outweighed by the national interest. This case does not involve the exercise by the state of its powers over health and safety nor to protect its roads, as in Maurer v. Hamilton, 309 U.S. 598, 60 S.Ct. 726, 84 L.Ed. 969, and South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734. It is a proposed state regulation of rates and this has 'commercial aims.' Maurer v. Hamilton, supra. This might be considered to be a matter requiring exclusive federal regulation, under Ohio R. R. Comm'n v. Worthington, 225 U.S. 101, 32 S.Ct. 653, 56 L.Ed. 1004, or under The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511, *but in any event we hold that Congress intended the federal regulation and the exceptions to occupy the entire field, and be protected as found by the trial court.*" (338 F.2d 495, at page 499. Emphasis added).

As was stipulated in the Joint Pretrial Order and found by the court below, the various appellee nonprofit shippers associations have, for a number of years, operated for their respective members to provide reduced freight costs by way of consolidating less than carload lots over long haul interstate routes and centralizing the assembly and distribution techniques in the pickup and delivery of the goods shipped in interstate commerce. The function and nature of such associations are well established and defined; nonprofit shippers associations must meet stringent requirements set down by the Interstate Commerce Commission or be subject to its regula-

tion as freight forwarders, 49 U.S.C., § 1002 (c)(1); *Atlanta Shippers Association, Inc.*, 322 I.C.C. 273 (1964); *cf., Pacific Coast Wholesalers Association v. United States*, 81 F.Supp. 991 (S.D. Calif. 1949).

Each of the motor carrier appellees herein service non-profit shippers associations either as the initial carrier which consolidates the less than carload shipments, or as the ultimate carrier which breaks-bulk and distributes the interstate shipments to the ultimate consignees. As was further found by the court below, and as set forth in the Joint Pretrial Order, some of the shipments into the State of California are delivered by the motor carriers, located within the "commercial zone" to consignees located within the same "commercial zone", and some of such shipments are delivered to consignees located outside of the commercial zone. The commercial zone is a territorial concept set forth in the provisions of 49 U.S.C., § 303(b)(8), and geographically delineated by the Interstate Commerce Commission, either by application of a general or specific population-mileage formula or specific metes and bounds description. See, *e.g.*, 49 C.F.R., § 170, *et seq; Los Angeles, California Commercial Zone*, 3 M.C.C. 248; *Los Angeles Harbor Commercial Zone*, 51 M.C.C. 676.

Congress expressly left the *extent* of regulation of motor carriers, transporting interstate traffic, within commercial zones to the Interstate Commerce Commission. 49 U.S.C., § 303(b)(8). By the express language of that section "unless and to the extent that the Commission" finds that the National Transportation Policy requires further regulation (other than hours and safety), such motor carriers shall not be regulated further. The Commission now exercises control over commercial zones by subjecting motor carriers operating in those zones to hours and safety regulations and defining the boundaries

of those zones (49 C.F.R. 190-197; 49 C.F.R. 170.1); therefore, the Commission has sufficiently acted to pre-empt the field and prevent further regulation by the states. *Charles Noeding Trucking Company v. United States*, 29 F.Supp. 537 (N.J. 1939). In adopting the comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce, Congress deprived the individual states of the power to exercise economic regulation over such interstate transportation. *Castle v. Hayes Freight Lines*, 348 U.S. 61, 63 (1954); *United States v. Capital Transit Co.*, 325 U.S. 357 (1945); *State Corporation Commission v. Bartlett & Co., Grain*, 338 F.2d 495 (10th Cir. 1964). *Cert Den.* 380 U. S. 964 (1965). Such definitive and affirmative Congressional action per force prevents the various states from creating a multiplicity of necessarily variegated and checkerboard systems of economic regulation. *Railroad Transfer Service, Inc. v. City of Chicago*, 386 U.S. 351, 359 (1967); *Chicago v. Atchison, Topeka & Santa Fe R.R. Co.*, 357 U.S. 77 (1958).

Furthermore, in the instant case, the attempted state regulation of the field results in a direct conflict with federal legislation. Following the adoption of 49 U.S.C., § 303(b)(8), Congress adopted the Freight Forwarder Act (1942), which precisely defined and regulated interstate freight forwarders.[3] 49 U.S.C., § 1001, *et seq.* Therein, Congress specifically and precisely recognized the existence and practices of nonprofit shippers associa-

[3] Appellants argue that the court's decision results in overturning its purported authority for regulation of the field involved, *i.e.*, *In re Consolidated Freightways, Inc.*, 42 Cal.P.U.C. 721, *reh.den.* 313 U.S. 561, *reh.den.* 313 U.S. 599 (1941). It is significant that the case was decided *prior* to the enactment of 49 U.S.C., § 1001, *et seq.*, and further that *Consolidated* did not involve nonprofit shippers associations. It must be assumed that the section was adopted with that case as well as 49 U.S.C., § 303(b)(8) in mind.

tions and forbade regulation of such associations as freight forwarders. (49 U.S.C., § 1002(c)).

To further assure nonprofit shippers associations the benefits of operating as non-regulated freight forwarders, Congress referred to them in 49 U.S.C., § 1008, where it allowed motor carriers to file assembling and distribution tariffs for services performed in other than the line haul portion of the carriage.[4]

As the court below found and as appears in the Joint Pretrial Order, the appellee motor carriers have for some time filed such tariffs with the Interstate Commerce Commission. Since deviation from such tariffs may result in sanctions imposed upon respondent carriers by the Commission (49 U.S.C., §§ 4,316(b), 317(b)),[5] there is obviously a conflict between the attempted state regulation and the federal legislation, in violation of Article VI, paragraph 2 of the United States Constitution. *Cf., Biff v. Navajo Freight Lines,* 359 U.S. 520 (1959); *Pennsylvania vs. Nelson,* 350 U.S. 497 (1956).

II

THE COMMERCE CLAUSE QUESTION

As a separate and sufficient ground for granting appellees the relief sought, the court below properly found that the economic regulation sought to be imposed by

[4] The Act allows motor carriers who service freight forwarders" . . . and others who employ or utilize the instrumentalities or services of such common carriers under like conditions . . ." to file tariffs with the Interstate Commerce Commission which establish assembling and distribution tariffs which differ from other established rates or charges. There is no question that the reference to "others" includes nonprofit shippers associations as the court below found.

[5] See discussion of "long and short haul" principle, Page ...., *infra.*

appellants violated the Commerce Clause, Article I, Section 8 of the United States Constitution.

As is discussed briefly, *supra,* appellee nonprofit shippers associations are able to provide their members interstate transportation at rates that allow them to ship their goods to California and other states and economically compete with local producers, because of the savings which result from the use of the federally sanctioned nonprofit shippers associations. The court below found, in light of the uncontradicted evidence, that the increased freight rates sought to be imposed by appellants upon the nonprofit shippers associations would ". . . impose a trade barrier by artificially impairing the ability of producers in other states to compete with those in California."[6] Such a result is clearly prohibited. *Buck v. Kuykendall,* 267 U. S. 307 (1925); *Wilmington Transportation v. Railroad Commission of Calif.,* 236 U.S. 151 (1914).[7] Appellants argue that for years states have been allowed to impinge upon the free flow of commerce when a proper state power is exercised to protect an appropriate state interest, and the burden upon the free flow

[6] The minimum rates sought to be imposed upon appellee nonprofit shippers associations would not be imposed upon freight forwarders since such regulation is precluded by the provisions of 49 U.S.C., § 302(c)(1), when the transportation is within a freight forwarder's terminal area "[which terminal areas are defined by the same limits as the commercial zones of 49 U.S.C., § 303(b)(8), see *Sea-Land Services, Inc. v. United States,* 222 F.Supp. 558 (Del. 1963)]". Therefore, the attempted economic regulation results in diminishing, to a substantial degree, the favorable effect of 49 U.S.C., § 1002(c) wherein Congress expressed an intent to allow nonprofit shippers associations to enjoy the advantages of an unregulated market place.

[7] Moreover, enlightened carriers' rate structures are not designed merely to favor the revenues of producers and carriers but to safeguard the consumer interest as well by equalizing access to markets. *Ayshire Collieries Corp. v. United States,* 335 U.S. 573 (1947).

of commerce is not substantial. To this basic principle appellees offer no argument, as indeed, they could not. However, the court below properly found that in this case economic regulation was not an appropriate state interest, and does not come within the recognized health, safety and welfare, or police power interests. *Cf., South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938); *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922); *State Corporation Commission v. Bartlett*, 338 F.2d 495 (10th Cir. 1964); *cert.den.* 380 U. S. 964 (1965). The only state interest seriously argued by appellants was that of an interest in uniformity of regulation within the state. The court correctly found that a need for such uniformity was not supported by the evidence, and further, it was not the type of interest recognized under the commerce clause cases. Notwithstanding the lower court's precise holding, appellants in their "jurisdictional statement" continue to urge inapposite authorities and have offered no authority to support their novel approach to basic principles of constitutional law.

Therefore, appellants' position regarding the state's ability to substantially burden interstate commerce deserves no further consideration by this Court.

As a further and sufficient basis for the court's finding that the commerce clause prohibits the attempted economic regulation, it is undisputed that the appellants' scheme of regulation violates the "long and short haul" principle. The *Shreveport Rate Case, Houston & Texas Railway Co. v. United States*, 234 U. S. 342 (1914). The fact that appellee carriers will be required to charge the associations higher rates for a shorter haul under appellants' scheme is sufficient to affirm the Court's decision below. *Significantly, appellants do not argue to the contrary, nor do they criticize the lower court's decision in this regard.* Therefore, on this ground alone, the motion should be granted.

III

NO QUESTIONS ARE PRESENTED WHICH REQUIRE FURTHER ARGUMENT BEFORE THIS COURT.

The lower court construed all relevant sections with clarity and certainty, following time-honored principles of constitutional law, and conformed to and are not in conflict with any other decision rendered by any other federal court. *Railroad Transfer Service, Inc. v. City of Chicago,* 386 U. S. 351, 359 (1967); *Chicago v. Atchison, Topeka & Santa Fe RR. Co.,* 357 U.S. 77 (1958); *State Corporation Commission v. Bartlett & Co., Grain,* 338 F.2d 495 (10th Cir. 1964). *Cert den.* 380 U.S. 964 (1965). Any of the straw men arguments of appellants regarding the ability of states to regulate purely local cartage are inapposite since the instant case involves an integral part of interstate commerce, rather than local cartage.

The cases cited by appellants regarding the ability of states to regulate commerce all deal with the exercise of an appropriate power to protect appropriate state interests; namely, health, safety and welfare, all of which have been recognized to have validity. (Appellants' Juris. Stmt., pp. 24, 25).[8]

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[8] *Maurer v. Hamilton,* 309 U.S. 598 (1940); *So. Carolina State H. Dept. v. Barnwell Bros.,* 303 U.S. 177 (1938) (size and weight limitation on motor vehicles); *Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132 (1963) (prevention of fraud and deception); *Panhandle Eastern Pipeline Co. v. Public Service Commission,* 332 U.S. 507 (1947) (direct consumer sales of gas); *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346 (1939) (maintenance of sanitary conditions and adequate prices); *Ziffrin, Inc. v. Reeves,* 308 U.S. 132 (1939) (control of transportation of liquor); *California v. Thompson,* 313 U.S. 109 (1941) (prevention of fraud and over-reaching by trans-

However, appellants have offered no authority to support their assertion of jurisdiction over the instant integral part of interstate commerce. Appellants have not offered one valid basis for such regulation, nor have they offered one state interest which needs to be served or will be served by the proposed regulation of rates of the motor carriers engaged in interstate commerce. Under these circumstances, this motion should not be granted.

IV

CONCLUSION

Since the decision of the court below was eminently correct in finding pre-emption of the field involved, either because the federal legislation encompasses the whole field and therefore the State is precluded from regulating the area, or the Interstate Commerce Commission has sufficiently acted in the field to prevent the State from acting, or the attempted regulation by the State of California results in an actual conflict with the federal regulation. Any of these bases is sufficient to support the court's decision.

Additionally, as separate grounds, the decision is correct because of the violation of the commerce clause in that the attempted regulation imposes a trade barrier upon interstate commerce, the state has no valid interest to justify even an incidental burden on interstate commerce, and finally, the attempted regulation violates the

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portation agents); *Robertson v. California,* 328 U.S. 440 (1946) (protection of the public from fraud and sharp practices on the part of insurance agents); *Townsend v. Yeomans,* 301 U.S. 441 (1937) (fixing of maximum charges which warehousemen may charge tobacco growers); *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960) (control of air pollution).

"long and short haul" principle set forth in the Shreveport Rate Case and recognized in the Interstate Commerce Act. Accordingly, appellees respectfully move this Court to affirm the judgment below in all respects.

Respectfully submitted,

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